

**BEFORE THE  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
WASHINGTON, D.C.**

---

**In The Matter Of:**

**Digital Performance Right  
in Sound Recordings and  
Ephemeral Recordings**

---

**Docket No. 2000-9  
CARP DTRA 1 & 2**

**REBUTTAL TESTIMONY OF MICHAEL FINE**

1. As a follow-up to the direct testimony I provided in this proceeding on behalf of Broadcasters and Webcasters, I have been asked to provide further testimony concerning the relative importance of the musical works recorded on an album vis-a-vis the contribution of the performing artist as a driver of album sales.

2. Based upon my analysis of data collected by SoundScan, as well as my own in-depth experience in and knowledge of the music industry for more than a decade, it is my opinion that the musical content of an album is at least as important as the artist's contribution to the success of an album as measured by album sales.

3. To examine this issue, I supervised the preparation of an analysis utilizing SoundScan sales data to examine the variability of album sales over time of the same artists.<sup>1</sup> The analysis focused on the twenty top-selling artists who had at least five album

---

<sup>1</sup> As I testified in my written direct and oral testimony, SoundScan is a data gathering service that collects information on music sales from the vast majority of retail sales outlets in the United States. Over 18,000 retail outlets, representing 86% of all retail music sales in the United States, report their point of sales information to SoundScan. SoundScan sales data forms the basis for charts indicating the weekly, monthly and yearly top-selling albums and singles as reported in the popular trade publication, Billboard, and over 20 U.S. newspapers. See Fine Testimony, ¶ 4.

releases since the inception of SoundScan in 1991. Bar charts reflecting sales for each album released since 1991 by each of the artists in the analysis are shown in Exhibit 1.

4. If an artist's contribution were the primary determinant of album sales, album sales histories would be expected to follow a typical lifecycle pattern. Sales would increase as the artist gained in popularity, remain at a peak for some time, and then decrease as the potential buying audience tired of the artist.<sup>2</sup> Albums would be commodities, and any album, regardless of the particular musical compositions embodied therein, would be expected to sell in proportion to the artist's popularity at the time of the album's release.

5. The results of my analysis strongly support the conclusion that the musical compositions embodied in the album are at least as important as the contribution of the artist. The charts in Exhibit 1 demonstrate that album sales by the vast majority of top-selling artists have not followed the expected lifecycle pattern, but rather show tremendous variability over time. In fact, artists whose album sales follow the expected lifecycle pattern are the exception and not the rule. Although album sales by certain artists in the analysis do exhibit this lifecycle trend,<sup>3</sup> for most artists, sales vary widely from album to album.

6. Not even the extraordinary popularity of some top-selling artists could guarantee strong sales of successive albums, and weak sales plainly reflected the public's negative reaction to the musical works. Sales of Mariah Carey's "Butterfly" and Garth

---

<sup>2</sup> The quality of a particular artist's performance, as distinguished from that artist's popularity, can be expected to remain relatively constant from album to album.

<sup>3</sup> See Exhibit 1, Charts 4 (Metallica), 6 (Kenny G) and 15 (Michael Bolton).

Brooks' "Fresh Horses" were less than half of the sales of their immediate prior albums, and sales of Dave Matthews Band's "Recently" were less than one-tenth of the sales of the preceding album. Each of these albums reversed what had appeared to be increasing sales trends by these artists. See Exhibit 1, Charts 1, 3, and 18.

7. By the same token, negative album sales trends are often broken by successful comebacks, which must be attributed, in substantial part, to the public's positive reaction to the musical works. Reba McEntire, U2 and Jimmy Buffet are examples of artists who followed periods of sales drought with very successful albums. The sales of Reba McEntire's "Starting Over," U2's "All That You Can't Leave Behind" and Jimmy Buffet's "Beach House on the Moon" far exceeded the sales of their most recent prior albums. See Exhibit 1, Charts 10, 12 and 20.

8. The impact of an album's musical works on an artist's album sales is further demonstrated by the fact that sales of greatest hits albums generally outperform studio albums, quite apart from any upward or downward sales trends for that artist. Greatest hits collections from Garth Brooks, The Beatles, Celine Dion, Alan Jackson, Reba McEntire and George Strait sold substantially more than the albums these artists had released directly preceding or following the greatest hits release. See Exhibit 1, Charts 1, 2, 5, 7, 10, and 14. This phenomenon strongly suggests that consumer purchase decisions are largely driven by the songs contained on particular albums, not simply by the popularity of the artist.

9. If an artist's popularity were sufficient to determine the artist's album sales, then sales of subsequent albums would reasonably approximate sales of prior albums. Yet the world of music is replete with artists who release one hit album that sells millions

of copies, but whose subsequent releases never sell more than a small fraction of the initial hit album. The sales records of these "one hit wonders" buttress the conclusion reached from examining the album sales records of the top-selling artists that the musical compositions are at least as important as the popularity of the artist.

10. Exhibit 2 includes album sales charts for a few illustrative "one hit wonders," whose subsequent albums never reached the level of sales of their hit releases. For example, Billy Ray Cyrus (famous for the hit song, "Achy Breaky Heart" included on his debut album), achieved only 18% of his debut album sales with his second album release. Sales of Kris Kross's second album were also only 18% of the sales of their first album (notable for the hit song, "Jump"). Hootie and the Blowfish fared slightly better, with second album sales totaling about 24% of first album sales. Sales of Ace of Base's second album achieved merely 14% of the sales of their debut album. See Exhibit 2, Charts 1-4. Although these artists were phenomenally popular, and their initial releases sold many millions of copies, sales of their follow-up albums were only a fraction of sales of their hit releases. The enormous drop in second album sales must therefore be explained, at least in substantial part, by the buying public's negative response to the songs on the follow-up albums.<sup>4</sup>

11. In summary, the high variability of album sales for both top-selling artists and one hit wonders strongly supports the conclusion that music consumers value musical compositions at least as much as they value the artists who perform them.

---

<sup>4</sup> The "one hit wonder" phenomenon is not limited to first albums. Although the best-selling albums by Live, Oasis, Coolio, Sublime and 311, were not their first albums, the releases subsequent to their largest selling albums were very weak performers. See Exhibit 2, Charts 5-9.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

A handwritten signature in cursive script, appearing to read "Michael Fine", written over a horizontal line.

Michael Fine  
President  
Fine Consulting Inc.

Executed this 4th day of October, 2001.